(g) if, from any cause whatsoever, any member ceases to be so, the partnership is dissolved as between all the other members;

(h) unless the partnership has been entered into for a fixed term, any partner may *retire* from it at any time;".

Section 206 is similar to section 24 of the English Act which is headed "Rules as to interests and duties of partners subject to special agreement: " and reads:

"The interests of partners in the partnership property and their rights and duties shall be determined, subject to any agreement express or implied between the partners by the following rules:-".

There is no provision therein identical with paragraphs (g) and (h). It should be noted that paragraph (g) uses the words "cease to be a partner from *any cause* whatsoever, the partnership is dissolved," and in my view a letter intimating an intention can be hardly termed a cause.

I am afraid I am unable to discover what cause could render a partner ceasing to be one, other than death which is stated in paragraph (j), except supervening illegality as in section 34, or where he has suffered his share in the partnership property to be charged for his separate debt (section 33(2) of the English Act) and insanity.

I will now deal with section 5(1) of the Civil Law Ordinance (No. 5 of 1956). It reads:

"5(1) In all questions or issues which arise or which have to be decided in the States of Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu with respect to the law of partnership.... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any written law*".

In my view, Chapter X of the Contracts (Malay States) Ordinance (sections 192-219) is other provision made displacing resort to the English Partnership Act.

I am of opinion therefore that it would be wrong to say that the notice of intention to dissolve given by letter dated February 14, 1973 has the effect contended by appellant. I would affirm the judgment of the High Court in both the Motions.

I may add that it was not possible for the court to make an order in terms of the plaintiff's motion as no competent person was put forward for the appointment nor his consent obtained thereto.

I would dismiss the appeal with costs. The deposit will be paid out to respondents to account of their taxed costs.

Appeal dismissed.

Solicitors: *Jagjit Singh & Co.; K. K. Lam & Co.*

HO KEAN v. KONG LAI SOO

[F.C. (Ali, Ong Hock Sim and Raja Azlan Shah F.JJ.) April 25, 1974]

[Ipoh — Federal Court Civil Appeal No. 111 of 1973]

Landlord and Tenant — Action for recovery of premises — Whether premises used for illegal or immoral purposes — Allegation that son of tenant exposed his private parts with intention that landlord's daughter in another part of the premises could see them — Control of Rent Act, 1966, s. 16(1)(d).

Practice and Procedure — Appeal — Whether respondent can rely on ground not taken in lower court — Ground not pleaded.

The appellant was the tenant of controlled premises. One of his sons was convicted of criminal trespass. Another of his sons was convicted of indecent exposure of his private parts. Both these offences were committed at the above-said premises. The question before the court was whether the two sons were guilty of conduct of using the premises for illegal or immoral purposes to enable the landlord to apply for recovery of possession under section 16(1)(d) of the Control of Rent Act. The High Court answered this in the affirmative ([1973] 2 M.L.J. 150). At the hearing of the appeal, the landlord (respondent) sought to rely on a point not taken in the lower court, that is, that by the acts of the tenant's children, there was a nuisance or persistent annoyance to persons in the neighbourhood within the first limb of section 16(1)(d) of the Control of Rent Act, 1966. This point had not been pleaded.

Held, allowing the appeal: (1) the phrase "use for illegal or immoral purposes" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. There must be some link between the guilty act and the premises which are the subject matter of the proceedings for possession;

(2) applying this test to the present case, the landlord had not on the pleadings and on the facts established his case that the premises were used for an "illegal or immoral" purpose;

(3) the respondent was precluded from relying on a ground which had not been pleaded and which was not a live question to be decided.

Cases referred to:-

(1) *R. Schneiders & Sons Ltd.* v. *Abrahams* [1925] 1 K.B. 301, 305, 307.
(2) *Abraham* v. *Wilson* [1971] 2 W.L.R. 93.
(3) *Rugby School* v. *Tannahill* [1935] 1 Q.B. 87.
(4) *Hoffman* v. *Fineberg* [1948] All E.R. 1592.
(5) *Walles & Sons Ltd.* v. *Thomas* [1921] 1 K.B. 541.
(6) *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.* [1965] 1 W.L.R. 850.

FEDERAL COURT.

S. Theivanthiran for the appellant.

Soo Wai Sun for the respondent.

Raja Azlan Shah F.J.: This appeal raises a short point of some practical importance on the operation of the provisions of section 16(1)(d) of the Control of Rent Act, 1966.

The landlord claimed possession in the magistrate's court of the front portion of the ground floor of controlled premises which he had let to the tenant, relying on the second limb of section 16(1)(d) of the Act that the tenant's two sons "have been guilty of using the tenancy premises "for illegal or immoral purposes." (Paragraph 3 of statement of claim).

One of the tenant's sons had in fact been convicted in May 1966 of criminal trespass under section 447 of the Penal Code when he entered into a room on the said premises occupied by the two daughters of the

landlord. In March 1971 the other son exposed his private parts at the landlord's daughter in another part of the said premises. He was convicted under section 509 of the Penal Code.

The tenant admitted the convictions but averred that they do not in law amount to using the tenancy premises for illegal or immoral purposes.

No evidence was led at the hearing before the learned magistrate. By consent both parties raised a point of law whether on the pleadings the premises were used for illegal or immoral purposes. The learned magistrate dismissed the action holding that the acts of the two sons did not go to show, much less prove that the premises were used for illegal or immoral purposes. On appeal Sharma J. reversed the finding of the learned magistrate: see [1973] 2 M.L.J. 150.

The learned judge took the view that the parties had agreed that the only point in issue was whether the obscene act of the tenant's son entitled the landlord to possession. Therefore he concluded that the conviction of criminal trespass under section 447 was totally irrelevant in its application to the present case. A perusal of the record revealed that he was clearly wrong. Paragraph 3 of the statement of claim and submissions of counsel before the learned magistrate disclosed that both counsel had agreed not to call evidence but to make submissions on the pleadings whether the premises were used for illegal or immoral purposes.

Therefore as I see it, the questions to be posed, as indeed should have been posed by the learned judge, are as follows: Did the son when he committed criminal trespass use the said premises for an illegal purpose? Did the other son use the said premises for an immoral purpose when he exposed his private parts at the landlord's daughter? The overall question therefore is: were the two sons guilty of conduct of using the tenancy premises for illegal or immoral purposes?

The learned judge answered the second question in the affirmative. He reached his conclusion on the basis of the statement of law enunciated by Bankes L.J. in *S. Schneiders and Sons Ltd.* v. *Abrahams*.[1] In my opinion the passage in the judgment of the learned Lord Justice as quoted by the learned judge expresses the correct principle of law on the point; the difficulty is always found in applying it.

In *Schneiders'* case the tenant was convicted of receiving at the demised premises certain property of the landlord well knowing the same to have been stolen. Bankes L.J. held that user of the premises was not an essential element, otherwise offences such as keeping premises as a brothel, counterfeiting coins or receiving stolen property on the premises, which would surely be within the contempation of the section, would not come within its ambit if a narrow construction is placed upon it. But the learned Lord Justice went on to say that it is essential that there should have been an improper use of the premises to carry out an unlawful purpose, for example, renting the premises as a storage or hiding place for drugs: see *Abraham* v. *Wilson*,[2] using the premises as a brothel: *Rugby School* v. *Tannahill*,[3] or using the premises as a gaming house: *Hoffman* v. *Fineberg*.[4] Thus it is not sufficient to show that the offence was one with which the premises has nothing to do beyond being the scene of its commission, for example, if the tenant was convicted of assault upon someone who happened to be on the tenant's premises. Nor will it suffice if the offence is only an isolated breach of the law governing the lawful use to which the premises are being put; *e.g.*, sale of beer within prohibited hours: *Waller & Sons Ltd.* v. *Thomas*.[5]

Therefore if I rent a room to live in it, I may be said to use the room. But if I exposed my private parts at another person who happened to be in my room, or to put the case nearer home, if I exposed my private parts at another person in an adjoining room, it is a misuse of language to say that I am using the room for the purpose of exposing my private parts. Similarly if I steal an article belonging to a neighbour, it will be the height of absurdity to say that I use my room for the purpose of committing the offence. In other words, there must be some link between the guilty act and the premises which are the subject matter of the proceedings for possession. The phrase "use .. for illegal or immoral purposes" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. The premises must, in my opinion, have been used as a "spring board" or "launching ground" to commit the offence.

Applying the test to the present case, I am not prepared to hold that on the pleadings the landlord has established his case. I would therefore allow the appeal and restore the finding of the learned magistrate. The tenant is entitled to the costs of the appeal.

There is another small but important point requiring consideration. Counsel for the landlord put forward a proposition on the lines enunciated by Willmer L.J. in *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.*,[6] i.e., as a respondent to this appeal he cannot be shut out from raising for the first time a point not taken below in support of the judgment which he has obtained. The point he wished to raise is that the judgment of the High Court be upheld on the additional ground that the two convictions considered together constituted a nuisance or persistent annoyance to persons in the neighbourhood within the first limb of section 16(1)(d) of the Control of Rent Act, 1966.

In *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.*, *supra*, the plaintiff/respondent had filed an action against his employers (the defendants/appellants), claiming damages for personal injuries. By his particulars of claim he alleged that the accident had been caused by negligence and/or breach of statutory duty of his employer, *inter alia*, (1) failed to provide him with a safe means of access; (2) failed to provide him with a safe system of working and (3) failed to comply with sections 28 and 29(1) and (2) of the Factories Act, 1961. The trial judge found that there had not been a safe system of working and gave judgment for the plaintiff, finding also that there had been no breach of statutory duty. The employers appealed. The plaintiff sought leave to file a respondent's notice to contend that the judgment should be affirmed on the

additional ground that, on the evidence, the defendants had been in breach of section 29(1) of the Act and that that breach had caused the accident. In allowing the application Willmer L.J. stated the well-known principle that the position of a respondent on appeal is quite different from that of the appellant who must confine his arguments to the points taken below but that the respondent is not precluded from taking any point in support of the judgment which he has obtained.

Winn L.J.'s judgment requires notice. He emphasised the fact that there was still a live question on the claim founded on section 29(1) which was clearly pleaded. Had this been expressly abandoned he said he would not have agreed to grant the application. He said this (page 853):

"I accordingly look at the matter on the footing that the claim was both pleaded and alive when the judge came to deal with the matter, in the sense that it had not been expressly abandoned. Had it been abandoned, I would have thought it quite wrong to grant the leave which the court is now granting to introduce the matter at this stage."

Although the facts in both the present and *Thomas'* case are dissimilar, the factors are not. In both cases the parties who sought to contend the additional point before the court of appeal are the respondents. Therefore they both can take advantage of the principle gleaned from *Thomas'* case if they come within that principle. Now in my opinion, the true scope of the principle in *Thomas'* case is that it is confined to cases where there is still a live question to be decided on a claim which is clearly pleaded. In *Thomas'* case the claim under section 29(1) was pleaded and still alive in the sense that it was not expressly abandoned. In our present case the claim to contend the first limb of section 16(1)(d) of the Act was not even pleaded, much less a live question. Therefore the landlord/respondent is not entitled to take advantage of the principle enunciated by Willmer L.J. in *Thomas'* case. Accordingly his counsel's proposition to put forward the line of argument propounded by Willmer L.J. cannot be entertained because it is devoid of merit.

Ali and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Thevin, Chandaran & Siva; Soo Wai Sun & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. E.D.C.

[F.C. (Azmi L.P., Suffian C.J. and Ong Hock Sim F.J.) May 10, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 57 of 1973]

Income Tax — Double taxation — Person ordinarily resident in Malaysia receiving income from Singapore — Tax for year of assessment 1969 — Whether Singapore income liable to Malaysian income tax — Double Taxation Relief (Republic of Singapore) Order, 1966 — Repealed law — Double Taxation Relief (Singapore) Order 1968 — Supplementary agreement entered into after judgment in High Court — Double Taxation Relief (Singapore) Order, 1973 — Whether amendment retrospective in effect — Income Tax Act, 1967.

This was an appeal from the decision of Gill F.J. (reported in [1973] 2 M.L.J. 22) where he held that the exemption granted by the 1966 Order continued to be operative in the year 1968 and therefore the respondent was exempt from tax on his income from Singapore for the year of assessment 1969. After the judgment was given a supplementary agreement was entered into between the Malaysian and Singapore Governments and the supplementary agreement was given the force of law by the Double Taxation Relief (Singapore) Order, 1973. This order was given retrospective effect and provided that paragraph 2 of Article XXI of the 1968 agreement shall not extend the 1966 agreement beyond the last day of the year of assessment 1968.

Held (Azmi L.P. and Ong Hock Sim F.J., Suffian C.J. dissenting) dismissing the appeal: (1) the amendment was enacted for the sole purpose of ensuring continuity and removing any doubt that the year 1968 was a year of no agreement when neither the 1966 agreement nor the 1968 agreement was applicable and in the context of the whole agreement "the year of assessment 1968" should be read as defined in section 2 to mean the "calendar year 1968";

(2) the amendment was intended to rectify an obvious omission and is retrospective and therefore the appeal should be dismissed.

Cases referred to:-

(1) *Attorney-General* v. *Vernazza* [1960] 3 All E.R. 97 at p. 101.

(2) *Quilter* v. *Mapleson* (1882) 9 Q.B. D. 672.

(3) *Stovin* v. *Fairbrass* (1919) 88 L.J. K.B. 1004.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellant.

J. Puthucheary for the respondent.

Suffian C.J. (Malaya) (read by **Ong Hock Sim F.J.**): We are concerned with income tax payable by Mr. E.D.C. (respondent) for the year of assessment 1969.

The facts briefly are as follows. The respondent is a partner of Cooper Brothers & Co., a firm of chartered accountants practising in Malaysia, Singapore and Brunei. He is ordinarily resident in Malaysia for the year of assessment 1969. In 1968 he received from Singapore:

(i) $49,408 as his share of the income of Cooper Brothers for the year ending 31st May, 1968; and

(ii) $2,090 gross dividends from two companies resident in Singapore received during the calendar year 1968.

As the income was received in 1968, tax is payable (if at all) on it in respect of the year of assessment 1969.

So the law applicable is the law relating to the year of assessment 1969.